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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in case 09-5327, Holland versus Florida.

5 Mr. Scher.

6 ORAL ARGUMENT OF TODD G. SCHER

7 ON BEHALF OF THE PETITIONER

8 MR. SCHER: Mr. Chief Justice, and may it  
9 please the Court:

10 It is undisputed that Petitioner was not  
11 provided notice that the State supreme court had denied  
12 his post-conviction appeal and had issued its mandate,  
13 with the result being that his AEDPA statute of  
14 limitations expired. The very day he learned this, the  
15 Petitioner immediately prepared a pro se habeas petition  
16 and filed it within 24 hours. Before this, Petitioner  
17 had taken --

18 JUSTICE SOTOMAYOR: How do -- what in the  
19 record shows us that the failure to tell him that by the  
20 lawyer was anything other than negligence? What in the  
21 record suggests that the lawyer, just as many lawyers  
22 do, forgot to call the client, forgot to send him  
23 something? What shows that this is more than  
24 negligence?

25 MR. SCHER: Well, first of all, we have what

1 the Eleventh Circuit characterized Mr. Collins' conduct  
2 as, which was gross negligence. And what we have here  
3 is a --

4 JUSTICE SOTOMAYOR: Well, I'm trying to find  
5 the basis for that finding.

6 MR. SCHER: We have a repeated pattern. For  
7 example, first of all we have to go back in terms what  
8 happened in State court. First we have Mr. Collins'  
9 assurances to Mr. Holland that he would in fact file his  
10 Federal -- or was aware of this --

11 JUSTICE SOTOMAYOR: But -- but --

12 MR. SCHER: I'm sorry?

13 JUSTICE SOTOMAYOR: That's what his intent  
14 was.

15 MR. SCHER: Correct.

16 JUSTICE SOTOMAYOR: People say I'm going to  
17 do something, and they fail to do it often because  
18 something else comes up, because something has happened.  
19 That doesn't show intentionality in -- the failure to  
20 act doesn't necessarily prove that it was intentional.

21 MR. SCHER: Well -- well, in terms of that  
22 what we have here, for example, is Mr. Collins was given  
23 two opportunities or the record shows that there were  
24 two opportunities for Mr. Collins to provide answers to  
25 these very questions. The most significant of those

1 responses was -- was in the Federal district court where  
2 the Federal district judge in fact issued a show cause  
3 order to Mr. Collins asking him to respond specifically  
4 to Mr. Holland's allegation. And in that response Mr.  
5 Collins completely ignored all of Mr. Holland's  
6 allegations. He never denied that -- being instructed  
7 to file the petition. He never denied that he had in  
8 fact informed Mr. Holland that he wouldn't -- that he  
9 would file the petition. He never denied any of the  
10 allegations with regard to the fact that Mr. Holland  
11 wanted that Federal habeas petition filed on time. He  
12 just went on to address --

13 JUSTICE SCALIA: Well, that -- that's the  
14 case in every case where -- where the lawyer is  
15 negligent and doesn't do something that -- that should  
16 have been done.

17 MR. SCHER: Well --

18 JUSTICE SCALIA: He has assured the client,  
19 I will take care of your case, and he doesn't do it.

20 MR. SCHER: Well, here we have --

21 JUSTICE SCALIA: That's all that happened  
22 here.

23 MR. SCHER: This -- this goes beyond the  
24 case of mere garden variety negligence that some of the  
25 courts have -- have addressed, because here we have a

1 combination of not only a failure; we have a failure to  
2 notify Mr. Holland that the State supreme court has in  
3 fact denied his opinion, despite repeated instructions  
4 from Holland to Mr. Collins that he file his petition.  
5 Mr. Holland wrote --

6 JUSTICE ALITO: The facts here -- the facts  
7 here are quite extreme, but I am troubled by where you  
8 think the line should be drawn. If it is just mere  
9 negligence, would that be enough for equitable tolling?

10 MR. SCHER: No, courts -- and this Court in  
11 Lawrence, for example, has held that mere negligence is  
12 not sufficient. What we have here certainly is  
13 suggestive --

14 JUSTICE ALITO: Well -- the difference  
15 between mere negligence and gross negligence, one of the  
16 thing I remember most clearly from torts in law school  
17 is that that's pretty -- that's an ephemeral  
18 distinction. But that's the one you one you think we  
19 should draw, between mere -- if it's gross negligence,  
20 then there's equitable tolling; if it's mere negligence  
21 it's not?

22 MR. SCHER: Well, we know certainly that the  
23 floor from -- cases from this Court and from other  
24 courts is the mere or garden-variety negligence. But  
25 when you get to other factors --

1 JUSTICE KENNEDY: Why should -- why should  
2 that be? Two cases. Two criminal defendants. One  
3 spends a lot of time trying to find the most competent  
4 lawyer he can, and he does. He finds a highly skilled  
5 lawyer, who makes one little mistake and it's  
6 negligence.

7 The other doesn't care, he gets a lawyer  
8 that's really incompetent and the lawyer is grossly  
9 negligent. Now you would be penalizing the client who  
10 exercised the most diligence under your rule. I don't  
11 understand the -- the justice of that. It seems to me  
12 that the first client should be better off, not worse.

13 Now maybe this is for your friend on the  
14 other side to answer as well, but I'm not sure, even  
15 following Justice Alito's initial line of questioning,  
16 we can distinguish between where gross and mere  
17 negligence, that -- that it's even fair that we do so.

18 MR. SCHER: Well, this Court --

19 JUSTICE KENNEDY: I didn't mean to interrupt  
20 line of questioning with it. But it seems to be  
21 consistent with it.

22 MR. SCHER: This and other courts have --  
23 have been able to draw that line, and of course you have  
24 to look at the specifics of each particular case,  
25 because not only --

1 JUSTICE KENNEDY: But what's the -- what's  
2 the point? What's the justice in doing that?

3 MR. SCHER: Well --

4 JUSTICE KENNEDY: Other than just to limit  
5 the number of cases in which we are going to set aside  
6 convictions?

7 MR. SCHER: Well, in some circumstances  
8 courts have just said, unfortunately you lose, your  
9 attorney didn't commit -- it was just a mere mistake.  
10 But what we have here, of course, is not -- we don't  
11 have a mere mistake; we have a confluence of these  
12 particular factors, and I think one of the more salient  
13 points that distinguishes Mr. Holland's case, for  
14 example, from Lawrence and from the situation in  
15 Coleman, is that Mr. Holland tried to rid himself of Mr.  
16 Collins on numerous occasions while this case was in  
17 State court. In Lawrence and in Coleman, the  
18 petitioners were not allowed to be free of their  
19 lawyers; they accepted their lawyer's representation --  
20 they accepted their representation and the acts and  
21 omissions that occurred in Lawrence and in Coleman were  
22 attributed to -- to the petitioners in those cases.

23 Here, however, by contrast Mr. Holland did  
24 everything he could -- he could, to be -- reasonably to  
25 be free of --



1 JUSTICE SOTOMAYOR: Are you suggesting that  
2 there should be a different standard for those habeas  
3 petitioners who are -- whose counsel is appointed for  
4 them by the State or by the Federal government, as  
5 opposed to just a lawyer they hire? That's what I'm  
6 hearing you say.

7 MR. SCHER: No, and I didn't mean to suggest  
8 that.

9 JUSTICE SOTOMAYOR: All right. So if the  
10 standard is going to be the same, I -- I go back to  
11 Justice Alito's question, which is, the Eleventh circuit  
12 is saying negligence/ gross negligence, the line is too  
13 fine to draw. But there is a difference in a line  
14 between negligence, however one defines it, and an  
15 intentional, bad faith, dishonest, conflicted  
16 malfeasance.

17 MR. SCHER: Correct.

18 JUSTICE SOTOMAYOR: All right. Why isn't  
19 that a more workable line, given that you can't have  
20 equitable tolling without exceptional circumstances?

21 MR. SCHER: Correct enough, but I think  
22 each -- well, certainly those were some of the  
23 individual factors that the Eleventh Circuit discussed  
24 when saying gross negligence isn't enough. I think in  
25 Mr. Holland's case --

1 JUSTICE SOTOMAYOR: You haven't argued why  
2 not, is what I'm saying to you. Exceptional  
3 circumstances has to mean something that really makes  
4 something exceptional. Why is negligence of any variant  
5 exceptional?

6 MR. SCHER: Because when you look at, for  
7 example at this particular case, when we are talking  
8 about an exceptional circumstance, you are talking  
9 about -- a lot of times when courts have done this --  
10 is the confluence of what the attorney did or didn't do  
11 versus what the petitioner did.

12 So we have, of course, along the lines of  
13 the extraordinary circumstances here, we have  
14 Petitioner's diligence. And in some respects they  
15 dovetail. And I think what the Eleventh Circuit did was  
16 say we don't care what the Petitioner did; we don't  
17 really care what the lawyer did; anything the lawyer did  
18 unless the lawyer was mentally ill or had divided  
19 loyalties -- and that -- those are the only factors that  
20 are going to be considered in terms of equitable  
21 tolling.

22 But that is -- that is an antithetical to  
23 the very nature of equity. Here --

24 JUSTICE SCALIA: We've never held that  
25 equitable tolling for anything is available under this

1 statute of limitations here.

2 MR. SCHER: That's correct. This Court,  
3 however --

4 JUSTICE SCALIA: And why should it be? It  
5 seems to me, this is not like the ordinary statute of  
6 limitations where it says, you know, the statute is five  
7 years, and courts make all sorts of necessary exceptions  
8 to the five years. But here you have a statute that --  
9 that provides exceptions, for example, the limitation  
10 period shall run from the latest of the date on which  
11 the impediment to filing an application created by State  
12 action in violation -- is removed.

13 In other words, we are going to toll it for  
14 that particular event.

15 The date on which the constitutional right  
16 asserted was initially recognized by the Supreme  
17 Court -- we are going to toll it for that.

18 The date on which the factual predicate on  
19 claim or claims presented could have been discovered  
20 through exercise of due diligence, many of -- many of  
21 the equitable tolling holdings involved precisely that.  
22 We will toll it, since you couldn't have found out about  
23 the violation within the statutory period.

24 But all of these things are handled already  
25 in 2244(d). Why should we -- why should we assume the

1 right to create some additional exceptions from the --  
2 from the one-year period?

3 MR. SCHER: Well, with all due respect, I  
4 don't concur with the premise that those four particular  
5 subsections of 2244(d) are exceptions or -- or are  
6 tolling provisions. Indeed this Court in Jimenez said  
7 that those four, (a), (b), (c) and (d), are --

8 JUSTICE GINSBURG: How many circuits have  
9 said that there is equitable tolling?

10 MR. SCHER: Eleven circuits. All of the  
11 circuits, and the only circuit that hasn't held that is  
12 the D.C. Circuit where it remains an open question. So  
13 all of the circuits that have addressed --

14 JUSTICE GINSBURG: Then it's the question of  
15 what are exceptional circumstances and whether it has to  
16 be something deliberate, which is what the -- as I  
17 understand it, the Michigan Court of Appeals said --  
18 yes, if it was bad faith -- if it was a lie, a  
19 deception --

20 MR. SCHER: Correct. In fact --

21 JUSTICE GINSBURG: So they are drawing the  
22 line between intentional and -- and without intending  
23 but just being careless.

24 MR. SCHER: Correct. And certainly here I  
25 think we have what they deemed to be gross negligence,

1    which I think certainly has an element of, let's say for  
2    example, to use the term "recklessness." I mean, we've  
3    got six or seven circuits which have addressed this  
4    particular issue in terms of this line between mere  
5    negligence and something more than that, and those  
6    circuits have all in the 13 or 14 years since AEDPA has  
7    been around, all been able to effectively deal with  
8    these particular cases on their particular facts.

9                   JUSTICE SCALIA: We have a case this  
10   afternoon involving an opinion of ours named McNally  
11   which held that there's no such thing as a fraud action  
12   for a right to honest services. How many of the courts  
13   of appeals had held that there did exist such a right  
14   when we held that there didn't in McNally?

15                  MR. SCHER: I'm not familiar.

16                  JUSTICE SCALIA: Every single court of  
17   appeals that had faced it had held that there was such a  
18   right. So the mere fact that you have 11 court of  
19   appeals that have found that they have extraordinary  
20   power -- judges like to find that they have power, and  
21   that doesn't necessarily make it right.

22                  JUSTICE STEVENS: It also assumes that  
23   McNally was correctly decided.

24                  (Laughter.)

25                  JUSTICE STEVENS: May I ask you another

1 question --

2 MR. SCHER: Yes.

3 JUSTICE STEVENS: -- prompted by Justice  
4 Kennedy's question. Have any of the circuits taken a  
5 look at the probable merit of the underlying claim in  
6 evaluating the issue?

7 MR. SCHER: In this particular case?

8 JUSTICE STEVENS: No, not in this particular  
9 case. But Justice Kennedy says it's equally unjust to  
10 the client whether it's negligence or gross negligence,  
11 and I'm just asking whether any of the reviews in this  
12 issue that you are familiar with, have they sometimes  
13 looked at the probable merit of the claim, and if there  
14 was merit, why, you were more disturbed about attorney  
15 negligence, whereas if it's a frivolous claim they  
16 wouldn't be. But do you know if any of them take a look  
17 at that at all?

18 MR. SCHER: There are certainly some cases  
19 that address the tolling and then of course address the  
20 merits of the petition. I don't know that there are any  
21 that link the two. But certainly if you have, for  
22 example -- the Respondent has argued that the floodgates  
23 are just going open, but certainly one of the -- one of  
24 the ways that a Federal district court can deal with  
25 this and has dealt with this in the past 13 years is to

1 look at the petition. And if the petition raises  
2 something that is palpably meritless you, don't even  
3 need to get to anything about whether its damages, just  
4 dismiss the petition, because of course the vast  
5 majority of case that AEDPA addresses in this particular  
6 chapter are noncapital cases and are pro se cases.

7 JUSTICE KENNEDY: I looked in the brief to  
8 see if there was reference to the merits, underlying  
9 merits of the case. Can you just tell me very quickly  
10 what the key elements are if we ever reach the merits?

11 MR. SCHER: In the Petitioner's case?

12 JUSTICE KENNEDY: Yes.

13 MR. SCHER: He has -- well, there were a  
14 number of issues that he raised on direct appeal. There  
15 was issues regarding counsel. For example, I know in  
16 the post-conviction motion one of the key issues was he  
17 had a what's termed in Florida a Nixon issue, which is  
18 where counsel conceded some of the elements of the  
19 crime.

20 JUSTICE KENNEDY: Well, I shouldn't probably  
21 take your time with that. I will look at the State  
22 record.

23 JUSTICE GINSBURG: Mr. Scher, one point that  
24 you didn't mention, but you did I thought stress it in  
25 your brief, was that counsel here said: Oh, the

1 deadline has run even before I was engaged, even before  
2 I was appointed to represent this man, so there was  
3 nothing that I could do for him, because the time had  
4 already expired.

5 MR. SCHER: That's correct,  
6 Justice Ginsburg. What happened is that that particular  
7 explanation came up after the fact. I think what's  
8 significant about that, number one, is that his  
9 explanations have been a moving target to a large  
10 extent. But what's even more important is that none of  
11 that information was ever imparted to Mr. Holland while  
12 the case was pending. While Mr. Collins was providing  
13 assurances and reassurances to Mr. Holland about, don't  
14 worry, your State post-conviction motion will be filed  
15 on time, your Federal rights will be honored, everything  
16 will be done, your appeal will be taken, once we are  
17 done in the Florida Supreme Court we will go off to the  
18 Federal district court, at no time did Mr. Collins ever  
19 say: We've got a big problem here; the statute may have  
20 run and so we need to start thinking in advance of ways  
21 to deal with this. For example, if Mr. Collins truly  
22 believed that the statute had already run, the day the  
23 Florida Supreme Court issued that decision he should  
24 have been in Federal court filing something right away.

25 JUSTICE ALITO: Could you just tell me in a



1 sentence or two what test you think we should apply for  
2 equitable tolling? What is necessary in order for there  
3 to be equitable tolling?

4 MR. SCHER: Your Honor, I think the -- the  
5 test is the test that this Court has applied, which is  
6 in Pace and in Lawrence, which is extraordinary  
7 circumstances coupled with diligence. I think under  
8 those particular -- coupled with diligence, the  
9 Petitioner's diligence.

10 JUSTICE ALITO: What does "extraordinary  
11 circumstances" mean?

12 MR. SCHER: It's a case-by-case type of  
13 issue. It's because it's an equitable remedy. It's not  
14 something that is susceptible to rigid rules, which of  
15 course is the problem with the Eleventh Circuit's  
16 categorical excursion of a particular large chunk of  
17 misconduct on the part of the attorney. But certainly  
18 here, where we have extraordinary circumstances, we have  
19 lack of notice to the Petitioner that his State court  
20 opinion had been issued, that they had affirmed, that  
21 the mandate had come out; and a failure to communicate,  
22 wholesale failure to communicate, bordering on in fact  
23 abandonment.

24 JUSTICE SCALIA: All of that has nothing to  
25 do with what caused, what caused the inability to -- to

1 bring the habeas action.

2 MR. SCHER: Well --

3 JUSTICE SCALIA: All of that is -- is  
4 preliminary to that. This may have been a very  
5 irresponsible lawyer, but that has nothing to do with  
6 the event that -- the simple event, failure to file in  
7 that what, 30-day period, which --

8 MR. SCHER: 14 days.

9 JUSTICE SCALIA: 14 days. It seems to me  
10 "extraordinary" means unusual. So you say any unusual  
11 event is a possible?

12 MR. SCHER: Well, I think the one --

13 JUSTICE SCALIA: Any unusual event is a  
14 possible for a court to say, oh, yes, it says a year,  
15 but this is unusual so we will give you a year and a  
16 half.

17 MR. SCHER: Well, I think what we have here  
18 is what makes this case I think unusual, and it's the  
19 first type of case that this Court has seen, is under  
20 these circumstances you have this confluence of events.  
21 And I think what makes this case -- what sets this case  
22 apart from the other ones that this Court has seen and  
23 that certainly other courts have seen is, for example,  
24 it's extraordinary the diligence of Mr. Holland to have  
25 asked the Florida Supreme Court on two occasions to rid

1     himself of Collins and he asked to proceed pro se.

2                   JUSTICE KENNEDY:   The client -- this client  
3     was sort of the pesky client, but apparently knew a lot  
4     more about AEDPA than most people generally do.  I mean,  
5     AEDPA's not exactly an ordinary term.

6                   JUSTICE SCALIA:   And had a lot of time to  
7     devote to it.

8                   JUSTICE KENNEDY:   And suppose you have a  
9     client that is just bewildered.  He doesn't know AEDPA,  
10    he doesn't know Federal court.  Why should he be in any  
11    worse position than this client?

12                  MR. SCHER:   Well --

13                  JUSTICE KENNEDY:   It seems to me it would be  
14    the other way around.  This fellow knew enough that, if  
15    he had really just done a little bit more, he would have  
16    -- well, he tried to file a petition, but he might have  
17    done a little bit more.

18                  But the uninformed client, the ignorant  
19    client, could never approach this.  I don't know why he  
20    shouldn't be more protected than your client, which goes  
21    back to Justice Alito's question.  I'm not sure how we  
22    draw this line.

23                  MR. SCHER:   I think the problem we have here  
24    with Mr. Holland is that the more diligent he was -- the  
25    more the Respondent and the lower courts have said he

1    should have done.  And so he did X, Y, and Z; they say  
2    you should have done A, B, and C.  But what I think is  
3    significant here is he was stuck with this lawyer.  He  
4    tried to get rid of the lawyer.  The State filed motions  
5    saying you can't -- not only can you not fire him, you  
6    can't file a pro se motion because you are represented  
7    by the lawyer.  So all Mr. Holland hears from the courts  
8    is that:  You can't speak to us and we can't speak to  
9    you.  So he's stuck.

10                   And then, of course, he's writing to the  
11   Florida Supreme Court clerk begging for information, and  
12   in fact in footnote 11 of the brief --

13                   JUSTICE GINSBURG:  But he never asked -- he  
14   wrote to the clerk but he never asked to be informed  
15   when the judgment came down.

16                   MR. SCHER:  Well, what we have, Your Honor,  
17   is if you look on page 11, in footnote 11, Mr. Holland  
18   wrote a letter to the Florida Supreme Court clerk,  
19   toward the end of which he says:  "I'm not trying to get  
20   on your nerves.  I would just like to know exactly what  
21   is happening with my case on appeal to the Supreme Court  
22   of Florida."

23                   So we certainly have in the clerk's office  
24   -- and again, that was on page 11, footnote 11.  And  
25   it's also at the Joint Appendix at 146 to 147.

1                   What we have here is Petitioner putting the  
2     Florida Supreme Court on explicit notice that he is  
3     having a problem with his lawyer, and further, earlier  
4     in that particular letter he apologizes to the clerk,  
5     saying: I'm sorry to pester you with these, with these  
6     requests, but if I had a lawyer who was responding to my  
7     letters and who was listening to me and who would send  
8     me the documentation I wouldn't have to be bothering  
9     you, but this is the situation that I'm in.

10                  And then of course he tries to not only have  
11     Mr. Collins substituted, but he asks to go pro se.  
12     That's an extraordinary circumstance. And what makes it  
13     even further, more extraordinary is the State coming in  
14     and saying, no, you can't not only do that, but you are  
15     not even allowed to file the paperwork asking to do  
16     that. And in fact, when Mr. Holland did file his pro se  
17     petition in Federal district court, the State moved to  
18     strike it because he was represented by -- by counsel.  
19     And so --

20                  CHIEF JUSTICE ROBERTS: Is this case  
21     different if the filing error -- I understand there was  
22     a lot going on, but if the lawyer just miscalculated the  
23     days and was off by one day, this case comes out the  
24     other way in your view, right?

25                  MR. SCHER: I think not only under my -- I

1 think, certainly, courts have -- have discussed it, but  
2 that's -- that's an unfortunate mere mistake. But I  
3 think certainly we don't have that under the facts of  
4 this case. There has never been any suggestion that  
5 there has been any miscalculation. We just have  
6 complete abandonment by -- by the --

7 JUSTICE SOTOMAYOR: I don't -- you say --  
8 you say complete abandonment. But this lawyer filed a  
9 whole lot of things on behalf of this client. He missed  
10 a very critical thing, the Federal habeas filing. But  
11 it's not abandonment of a client in the sense of not  
12 doing anything for the client.

13 So it goes back to my beginning question,  
14 which is, where is the line drawn between the types of  
15 negligence and what the circuit suggested, which is some  
16 sort of intentional malfeasance?

17 MR. SCHER: And I didn't mean to suggest --  
18 when I -- when I used the word "abandonment," I'm -- I'm  
19 referring to, of course, in terms of abandonment with  
20 regard to preserving -- enforcing the assurances that  
21 Collins had made with respect to filing the petition.

22 And, of course, he also had told -- that --  
23 Mr. Holland that he would inform him of the Florida  
24 Supreme Court's decision, because that, of course, is  
25 the triggering date.

1                   We have Mr. Holland who had already been --  
2   you know, asked his lawyer, you know, please file  
3   certain issues in my case and please keep me informed.  
4   And those two promises and assurances were not kept by  
5   the lawyer.

6                   Mr. Holland at that point has reason to be  
7   concerned that the additional promise, which is, I will  
8   file on time is not going to be honored. And so  
9   Mr. Holland embarked on a series of diligent steps in  
10   order to get some information, but he didn't know where  
11   to turn. And, then, of course, for example, he writes  
12   letters to the clerk's office of the supreme court,  
13   sometimes they send him information, sometimes they tell  
14   him to send a check.

15                  He doesn't know. He is not getting any  
16   consistency, and he's certainly not getting any response  
17   from his attorney.

18                  Then he files the motions in the State  
19   supreme court, which are opposed by the States as  
20   nullities because he is represented by counsel. He then  
21   writes to the Florida Supreme Court saying, can you give  
22   me the information about your web site, maybe I can have  
23   some friends look up this case, because, of course, he  
24   knows at this point that there is a problem, and he  
25   knows that the triggering date for the filing in the

1 Federal petition is the denial by the Florida Supreme  
2 Court and the issuance of a mandate.

3 JUSTICE GINSBURG: And then you are -- you  
4 seem, from what you just said, to be relying on a  
5 distinction between paid counsel, who is just as  
6 zealous, and a court-appointed counsel because in the  
7 one case the client had picked that attorney, and in the  
8 other case, the client was given this attorney by the  
9 State, so I think you are suggesting that the State has  
10 some responsibility when it provides the counsel.

11 But before you said, no, your answer would  
12 be the same if you were not making a distinction between  
13 court-appointed and paid counsel.

14 MR. SCHER: I think the -- the distinction  
15 that I was making -- I'm not saying that there's a  
16 difference in terms of paid or appointed counsel, but  
17 here where you have appointed counsel, I think one of  
18 the extraordinary factors is the State coming in and --  
19 and moving to strike these pro se pleadings, telling  
20 Mr. -- sending a signal to Mr. Holland that you are  
21 stuck with Collins, you can't speak to the supreme  
22 court, and the supreme court can't speak to you.  
23 Everything has to be funneled through your lawyer.

24 And, of course, the ironic thing is that had  
25 Mr. Holland been permitted to proceed pro se, he would



1 have gotten copied with the decision by the supreme  
2 court of Florida. He would have gotten copied with the  
3 mandate. And then he would have known when the mandate  
4 issued.

5                   And as we know, when he found out -- I mean,  
6 the other extraordinary factor here is that when he  
7 found out that this happened, he prepared that petition  
8 that day and mailed it the next day. This is not  
9 somebody who sat on his rights, he didn't start  
10 complaining and writing letters and bemoaning his  
11 situation. He took action, which also distinguishes  
12 this case from a number of other --

13                   CHIEF JUSTICE ROBERTS: I guess I understand  
14 what the cases have said. I -- I have trouble  
15 understanding why that should make a difference, why  
16 that should be so pertinent, why he should be in better  
17 shape than somebody who says, look, I don't know  
18 anything about this, I need a good lawyer, this is what  
19 I get, I'm trusting you, tell me what I should do and I  
20 leave it in your hands, and that person is somehow in  
21 worse shape?

22                   MR. SCHER: Well, because in Lawrence and in  
23 Coleman this Court had -- had said that that made a  
24 difference. In Lawrence this Court had said Lawrence  
25 was out of luck because it's not like he asked for

1 another lawyer or asked to proceed pro se. And so  
2 Holland -- and so Lawrence was stuck.

3 I would respectfully reserve the remainder  
4 of my time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 Mr. Makar.

7 ORAL ARGUMENT OF SCOTT D. MAKAR  
8 ON BEHALF OF THE RESPONDENT

9 MR. MAKAR: Mr. Chief Justice, and may it  
10 please the Court:

11 This case, we believe, is decided by one  
12 principle --

13 JUSTICE STEVENS: May I just ask, this is  
14 just an information question before you -- are the post  
15 conviction lawyers in these cases that are appointed,  
16 are they compensated by the State?

17 MR. MAKAR: Yes, they are.

18 JUSTICE STEVENS: They are.

19 JUSTICE KENNEDY: And also, just in the  
20 course of your argument, how -- how often do these  
21 deadlines missed, A, in capital cases and, B, in AEDPA  
22 cases? Do you have any statistics on that, or can you  
23 tell us from your experience?

24 MR. MAKAR: I can tell you anecdotally the  
25 attorneys who handle this case in Florida that equitable

1 tolling issue comes up with some regularly. I am aware  
2 of three cases just in Jacksonville where I live where  
3 the district judge there has had evidentiary hearings  
4 and has looked at these equitable tolling issues.

5 In Florida we have 394 individuals on death  
6 row, and those cases are at various stages of  
7 litigation. So there is a certain amount of that that  
8 goes on.

9 As to the non-capital cases, we know that  
10 the system is flooded with habeas petitions. Obviously,  
11 most of those are unrepresented. But there still is, in  
12 those cases -- a study I saw recently, a 2007 study from  
13 Vanderbilt University, that about 20 percent of those  
14 cases are dismissed on statute of limitations grounds.  
15 I am inferring from that that there is some equitable  
16 tolling action going on there, but the specific amount  
17 we are not sure of. But certainly in both the capital  
18 and non-capital area this is an issue.

19 And if I could get to the standard here.  
20 Obviously, we are asking this Court to use the analysis  
21 it has done in other cases to find that there is no  
22 equitable tolling whatsoever.

23 JUSTICE BREYER: You mean to imply that  
24 earthquake, fire, flood, mad postman burns mail truck,  
25 et cetera?

1                   MR. MAKAR:  Precisely, Your Honor.  I  
2   mean --

3                   JUSTICE BREYER:  Even if it's a terrible  
4   earthquake, all these people are just out of luck?

5                   MR. MAKAR:  Well -- well, there are some,  
6   certainly, safety valves if there is a natural disaster.

7                   JUSTICE BREYER:  Well, why?  Natural  
8   disaster, yep, you said no equitable tolling, they are  
9   out of luck?

10                  MR. MAKAR:  Well -- well, for example, the  
11   rules of criminal procedures were recently amended to  
12   allow for late filing when the court has --

13                  JUSTICE BREYER:  It's a statute.

14                  MR. MAKAR:  Precisely, Your Honor.  And we  
15   think --

16                  JUSTICE BREYER:  And, so, are you -- you  
17   read the statute to say in some cases you can do it.  If  
18   you are going to read it in some cases you can do it,  
19   then I guess we are at a discussion of is this one of  
20   those cases?

21                  MR. MAKAR:  Well, two responses.  Number  
22   one, we do not believe that equitable tolling was  
23   intended by Congress under this complex statute of  
24   limitations for all the reasons set out in our brief.

25                  JUSTICE BREYER:  So that is earthquake,

1 fire, flood, et cetera?

2 MR. MAKAR: Exactly. And it relates to the  
3 same result, it seems, to the same result as this Court  
4 came to in Beggerly and Brockamp, where the -- if  
5 Congress intended that to be the case, that's the case.

6 JUSTICE ALITO: What if the lawyer lies to  
7 the client and the client says my time is running out,  
8 have you filed my -- my Federal habeas petition, and the  
9 lawyer says, yes, I filed it and here it is. And it has  
10 a -- a forged date stamp on it. No equitable tolling  
11 there?

12 MR. MAKAR: Well, under our position that  
13 Congress intended to draw a very clear line, no. If  
14 the -- if the Court assumes or decides there is some  
15 sort of equitable tolling, then that's a different case,  
16 and -- and in those situations where there is something  
17 beyond the incompetence of the lawyer. That's our rule.  
18 If the Court decides there is equitable tolling or  
19 assumes it exists, it has to be that the rule that the  
20 incompetence of the post conviction counsel cannot be a  
21 basis for relief.

22 That's what this Court has essentially said  
23 in Lawrence and also in Coleman and also what Congress  
24 inferentially said in -- in 2254(i).

25 So, under those circumstances, here our rule

1 works because you don't get into this gradations of  
2 negligence, is it gross negligence, well, how gross.  
3 And the bottom line here in this particular case, of  
4 course, and the Court has asked these questions here, is  
5 what really happened in this case, all you had was a  
6 Lawrence error, which was --

7 JUSTICE BREYER: Why should it matter? It's  
8 certainly unusual. Isn't that what we are after, one,  
9 is he diligent? Answer, yes, he has been diligent.

10 Two, is it extraordinary? I would think it  
11 was fairly extraordinary a person writes these letters  
12 to counsel and so forth, then the -- the thing isn't  
13 filed. Is that extraordinary or not?

14 Whether it was his fault, whether he himself  
15 was kidnapped. I mean, maybe it wasn't the counsel's  
16 fault. You can imagine a lot of circumstances. But the  
17 question, I would think, is, is it extraordinary and is  
18 it fair?

19 MR. MAKAR: Well, the -- the answer is it --  
20 is it extraordinary? The answer is no. This is --

21 JUSTICE BREYER: You mean counsel in Florida  
22 often when -- miss deadlines and so forth when their  
23 counsel -- when their client specifically says to them  
24 even a few weeks before, if by mail several times,  
25 please file such-and-such, it is not extraordinary in

1 Florida?

2 MR. MAKAR: It's not just Florida, it's  
3 nationwide there's -- there's problem with this complex  
4 statute of the limitations.

5 JUSTICE BREYER: And we have a problem with  
6 the bar, don't we, if -- if -- if the -- if --

7 (Laughter.)

8 MR. MAKAR: Well, there -- there has been no  
9 bar discipline, to my knowledge, from missing a  
10 deadline. And that -- and this Court has held it is not  
11 an extraordinary circumstance in Lawrence. The only --

12 JUSTICE KENNEDY: I -- I -- I didn't hear.  
13 You say there has been discipline or there --

14 MR. MAKAR: To my knowledge, there has not  
15 been for missing a deadline.

16 JUSTICE KENNEDY: If we are -- this would  
17 probably be the Congress -- assuming some rule maker had  
18 some authority to do this, would it make sense to say  
19 that the State is going to be subject to equitable  
20 tolling on a rather broad standard if we are going to  
21 give equitable tolling often, unless the State has  
22 attorney discipline procedures, so that this happens  
23 only once and then the attorney can no longer practice  
24 in the Federal court?

25 MR. MAKAR: I suppose as a matter -- -

1 JUSTICE KENNEDY: Obviously what we are  
2 looking for is some sort of a rule to keep the deadline,  
3 and if we are going to accommodate your friend on the  
4 other side, to have -- to have some rule about  
5 exceptional -- exceptional cases.

6 MR. MAKAR: Well, perhaps something along  
7 those lines legislatively might be -- be considered, but  
8 -- but in the end what we have here is garden-variety  
9 attorney negligence miscalculating and missing a  
10 deadline. The --

11 JUSTICE ALITO: Isn't there at least one  
12 additional thing here? Holland filed a request -- a pro  
13 se request to be relieved of Collins' representation,  
14 and that was rejected by the -- that was rejected by the  
15 court because he was pro se. And therefore he couldn't  
16 ask -- he couldn't file something himself?

17 MR. MAKAR: Well, let me clarify that,  
18 because there is a misconception going on here. In the  
19 Florida Supreme Court post-conviction process, Collins  
20 -- I'm sorry, Holland twice filed motions to remove  
21 Collins. Importantly, Holland never asked to go pro se.  
22 That is incorrect. If you look at Joint Appendix 134  
23 and 149, those are the two pro se filings that Holland  
24 made here, in both of those he said I'm having a  
25 conflict with my lawyer. My lawyer won't do what I want



1 him to do; I want a new lawyer. And that's all he said;  
2 I want a new lawyer. He never --

3 JUSTICE ALITO: Was that denied on the  
4 ground that he was pro se?

5 MR. MAKAR: The first motion was stricken.  
6 It was then denied because he was represented by counsel  
7 at that point. Keep in mind, this is in the State  
8 post-conviction process. This is not where the Federal  
9 AEDPA deadline and so forth is being kicked about. In  
10 fact, there is really no discussion whatsoever about  
11 what the actual deadline to file this petition was at  
12 all in the record.

13 The only time Holland asked to go pro se in  
14 any court filing is after he filed the pro se petition  
15 in Federal court -- the untimely one. He then shortly  
16 thereafter filed an emergency motion to relieve Collins.

17 JUSTICE ALITO: What I don't understand is,  
18 how can a -- how can a client request to have -- to be  
19 relieved of representation, if the client can't file  
20 that motion pro se? I understand the other things, but  
21 I don't understand why -- how -- how you can deny the  
22 request to get rid of this lawyer? Unless he has to  
23 have the lawyer file the motion for him?

24 (Laughter.)

25 MR. MAKAR: No, I think certainly the filing

1 of the motion, I think perhaps it was -- it shouldn't  
2 have been stricken the first time, but the court on the  
3 merits denied it the second time. And keep in mind, I  
4 forgot who alluded to it. This has been somewhat of an  
5 unusual case from the outset, in that if you look at the  
6 three Florida Supreme Court opinions that have been  
7 issued in this case it shows that at the first trial  
8 Holland absented himself from the -- absented himself  
9 from the trial and he had to watch on circuit --  
10 closed-circuit TV because he was being very difficult.

11 And then in the second trial we had two  
12 Faretta hearings amounting to hundreds of pages in which  
13 the Florida Supreme Court then said well, he wants to  
14 represent himself but he can't conduct himself properly  
15 and so forth. And also there's the issue of his -- his  
16 -- there is a mental issue there as well, that he has  
17 raised on appeal as well.

18 So the court -- the Florida courts are sort  
19 of put in this difficult posture of saying, we want you  
20 to have counsel, we need you to have counsel because we  
21 want you to have effective representation, but then  
22 throughout the process here it's been a difficult,  
23 difficult number of decades, essentially in this  
24 situation. So I think it's an unfair characterization  
25 to say that the Florida courts and also the office of

1 attorney general who file -- who routinely moves to  
2 strike these, it's not because we're trying to deny  
3 anyone's day in court. It's because you have a lawyer  
4 and they have to speak to the lawyer and the hybrid  
5 representation is impermissible. So --

6 JUSTICE SOTOMAYOR: Can we go back to  
7 just --

8 JUSTICE GINSBURG: The State -- the State  
9 has no responsibility even though it made this  
10 appointment? So you agree there's no difference,  
11 whether it's paid counsel, somebody that the -- that  
12 defendant picked to represent him, and someone that he  
13 just had to take because it's what the State gave him?

14 MR. MAKAR: Exactly. And -- and that's the  
15 way the Court's decision in Coleman has allocated the  
16 burdens and the risks. I mean, what the Court said was  
17 okay, if it's direct appeal where the State is charged  
18 with that responsibility, that's one thing; but when  
19 it's post-conviction, it's shifted. The whole paradigm  
20 and whole structure is flipped the other way and you,  
21 the Petitioner, bear the burden, and not the State.  
22 This is important under AEDPA, because AEDPA --

23 JUSTICE GINSBURG: Under -- on direct appeal  
24 if counsel conducted himself this way, the State  
25 would -- he would have to get relief because the State

1 would have the burden, but not -- not on -- is that what  
2 you're saying?

3 MR. MAKAR: Sure. On direct appeal if the  
4 lawyer's deemed to be ineffective, then that would be a  
5 constitutional error and that would be subject to some  
6 sort of relief; but it flips in the post-conviction  
7 stage as this Court has held in Coleman.

8 CHIEF JUSTICE ROBERTS: Counsel, I'm  
9 concerned about some of the situations Justice Breyer  
10 mentions, you know, if there is an earthquake, a plane  
11 crash, but the law seems to be focusing on other thing  
12 when it's talking about extraordinary circumstances.  
13 Like here, we are talking about how diligent he was in  
14 pursuing his lawyer. There seems to be a disconnect  
15 there.

16 I don't know why -- I mean, assuming we are  
17 going to have, for argument, equitable tolling, what  
18 should we be looking at? The unusual nature of the  
19 situation that comes up, or whether you've got a pesky  
20 client?

21 MR. MAKAR: Well, I think two responses  
22 there. Obviously we believe that attorney incompetence  
23 or so forth cannot be a basis for equitable tolling.  
24 These other situations about natural disasters and  
25 hypotheticals where some you know, very unusual, bizarre

1 situation comes in that is external to the  
2 attorney-client relationship, perhaps those -- those  
3 could be considered.

4 But we believe that the Congress through its  
5 purpose in enacting this statute of limitations, a  
6 complex one that has exceptions, that -- that is  
7 designed to alleviate the burdens and delays, its intent  
8 was not to allow equitable tolling, because we --

9 CHIEF JUSTICE ROBERTS: Well, but it  
10 legislated against the background of cases like Irwin  
11 that stated the general proposition is, unless Congress  
12 says otherwise, there is equitable tolling.

13 MR. MAKAR: But that can be rebutted. That  
14 can be rebutted, and we believe has been rebutted by the  
15 record, which shows that these were precisely the kind  
16 of delays that Congress intended to avoid by having a  
17 strict 1-year statute of limitations. That there's  
18 burdens put on -- not the States but the court --

19 JUSTICE SOTOMAYOR: I -- what I worry about  
20 is that you are confusing the -- or I perceive --  
21 confusing the fact that lawyer negligence may not be the  
22 type of situation that Congress was looking at. With  
23 the hypotheticals that Justice Breyer listed, which are  
24 a different kind of situation, and you are trying to  
25 pigeonhole both and say, Congress didn't intend for both

1 to be covered. And yet you suggested a little later  
2 that they may have intended what Justice Breyer was  
3 thinking about. I -- I don't see anything in the  
4 structure of the statute that would preclude what  
5 Justice Breyer listed.

6 MR. MAKAR: Well --

7 JUSTICE SOTOMAYOR: So what can we read to  
8 suggest that -- forget about the lawyer malfeasance,  
9 let's talk just about equitable tolling in its  
10 traditional sense.

11 MR. MAKAR: Sure.

12 JUSTICE SOTOMAYOR: Most of the cases in  
13 equitable tolling, by the way, have to do with court  
14 errors.

15 MR. MAKAR: Sure. What we are suggesting is  
16 that under the structure of the Brockamp decision, what  
17 the Court looked at there to determine when there is no  
18 equitable tolling intended by Congress, that here  
19 likewise there is no equitable tolling, and as the Court  
20 held in Brockamp, the fact that there may be unfairness  
21 in individual cases was the price Congress was willing  
22 to pay, the tradeoff it was willing to allow, to have a  
23 habeas system that was functioning.

24 Now assuming that position is rejected by  
25 the Court or the Court assumes equitable tolling, the

1 next question is what should be allowed. And we believe  
2 it has to be exceptionally narrow. And certainly in  
3 this case -- and this case is all about attorney  
4 negligence or attorney gross negligence -- those --  
5 those sort of circumstances are not enough. And --

6 JUSTICE BREYER: Why could you not say  
7 here -- I mean, the key sentence, I take it, is the  
8 Eleventh Circuit and it says: No allegation of lawyer  
9 negligence or failure to meet the standard of care --  
10 none -- without proof, bad faith, dishonesty, mental  
11 impairment on the part of the lawyer, could ever  
12 qualify.

13 Now that's -- so we just say, no, no, that  
14 isn't so. Sometimes it could, when combined with other  
15 circumstances. And then go back and let them -- I don't  
16 know what this particular individual Petitioner's prior  
17 conduct has been. I understand the problems that you  
18 have. But do you -- I guess you are going to say no to  
19 this, but it's a little hard to see why you couldn't  
20 have a narrow standard but just not rule out the  
21 possibility that under certain circumstances, just  
22 negligence or even less -- maybe the lawyer wasn't even  
23 at fault, maybe he got kidnapped. I mean there are odd  
24 things that happen in life. And just say go look for  
25 this; see if it's truly extraordinary, if it's fair, if

1 he was diligent. What about that?

2 MR. MAKAR: Well we agree with the Eleventh  
3 Circuit standard to the extent it says that this sort of  
4 attorney negligence, gross negligence, incompetence, is  
5 not enough. Where we differ from the eleventh Circuit  
6 is we're concerned, based upon our pragmatic day-in,  
7 day-out handling of these cases, that when you say  
8 dishonesty, well -- or a conflict, that those concepts  
9 can be conflated into things that they are not,  
10 particularly when these communications between lawyer  
11 and client are outside the State's view. We are not  
12 privy to what goes on between lawyer and client. The  
13 lawyer says, I will do this, says it verbally or maybe  
14 even in writing; we don't know about that, we're not  
15 privy to all that.

16 And it creates this potential, when we allow  
17 the standard, as the Eleventh Circuit held, we allow the  
18 standard to gravitate away from its core purpose and  
19 allows it to be used to sort of game the system in a way  
20 to gain an advantage. That's why we are concerned about  
21 any degree of attorney misconduct or behavior because it  
22 could easily --

23 JUSTICE SOTOMAYOR: Do you do have any idea  
24 between the Eleventh Circuit announced its standard how  
25 many habeas petitions were tolled by district courts in



1 your -- in Florida, on the basis of equitable tolling,  
2 that they permitted petitions to go forward after the  
3 statute of limitations?

4 MR. MAKAR: Unfortunately, I'm not aware of  
5 any data on that. There are not that many.

6 JUSTICE BREYER: So would there be -- I  
7 mean, what I'm actually worried about is not a lawyer  
8 being kidnapped. I'm actually worried that it can  
9 happen to a person, he gets deathly ill, his wife gets  
10 sick, something happens to the children, some very  
11 unusual thing comes along at the last minute and all the  
12 plans go awry, and to have a little bit of flexibility  
13 in this statute to take care of those very unusual human  
14 circumstances seems a reasonable reading of it. But you  
15 say it's not because?

16 MR. MAKAR: Well, we say it's not because  
17 Congress intended not to have equitable tolling, and  
18 then to the extent it did it could have drafted  
19 something along the lines of what's in 2263, which is  
20 the next chapter, the companion chapter, that says  
21 instead of having 365 days with no equitable tolling,  
22 you can have 180 days and 30 days for good cause if  
23 there's a deadline missed.

24 CHIEF JUSTICE ROBERTS: You're not -- you're  
25 not worried about Justice Breyer's case of the really

1 extraordinary circumstance where everybody would say,  
2 well, that's -- you know, we understand. You are  
3 worried that if you create an exception that all sorts  
4 of other stuff will come in. So why isn't the answer to  
5 that concern that you have got an unusual case here  
6 where you do have the client saying, do this, do this,  
7 do this, and the lawyer doesn't?

8 MR. MAKAR: Well, under these facts --

9 CHIEF JUSTICE ROBERTS: It's very hard to  
10 argue against -- against equity, against equitable  
11 tolling. But at the same time, I think you do need a  
12 constraining principle that it doesn't do away with the  
13 statute of limitations. So why isn't what we have here  
14 good enough?

15 MR. MAKAR: Meaning the Eleventh circuit  
16 standard?

17 CHIEF JUSTICE ROBERTS: Meaning the fact  
18 that you have got a client who is constantly telling the  
19 lawyer, do this, get it done, doesn't get the judgment.  
20 And it's not just your run-of-the-mill case where the  
21 lawyer happens to miss a deadline.

22 MR. MAKAR: Well, that goes to the issue of  
23 diligence, of course, which is not the issue we are  
24 looking at. We are looking at the extraordinary  
25 circumstances, not the diligence. Extraordinary

1 circumstance has to be something that's attributable to  
2 the lawyer or something along those lines.

3           We're not -- we'll concede diligence for the  
4 moment and say, hey, it's what the lawyer did. That's  
5 Lawrence's holding. He missed the deadline. In fact,  
6 in this case -- in Lawrence, obviously it was 364 days  
7 before they even filed the State post-conviction motion  
8 and a lawyer in that case wasn't appointed for 300 days,  
9 and the State's post-convictions process was sort of in  
10 disarray. And all those things that the Court in  
11 Lawrence said are not supportable for equitable tolling  
12 apply equally here.

13           The only difference in this case is this  
14 allegation that the lawyer didn't communicate with his  
15 client. Well, if that becomes the governing rule all is  
16 lost, because attorney communication with client is  
17 perhaps even more amorphous a concept. It could be  
18 based on verbal representations and so forth. So we are  
19 very concerned that it not slip into that sphere where  
20 it can be easily manipulated for the advantage of  
21 getting some sort of delay.

22           And as I say, the analysis here of the  
23 purpose of AEDPA, the structure of AEDPA and the  
24 burdens, as I say, the burdens are important to the  
25 State and to the court system. I was looking at that

1 recent study, the 2007 study, that seemed to suggest  
2 that AEDPA is -- basically, when these cases are being  
3 filed in Federal district court, it has taken a year and  
4 a half or 2 or 3 years for them to be resolved and in  
5 this case keep in mind it took 18 months in the district  
6 court, 18 months in the Eleventh Circuit, and then  
7 further.

8           Allowing the invocation of this doctrine,  
9 not just in this case but we are worried about the  
10 non-capital context as well, that that will somehow put  
11 an end to the importance of what Congress enacted.

12           There is a pre-AEDPA mentality out there,  
13 I'm afraid. And it's natural, it's understandable.  
14 We're all human. There is a pre-AEDPA mentality that  
15 there must be a remedy, there must be some equity done,  
16 and I think that sort of undergirds why perhaps most of  
17 the circuits have either assumed -- I think 11 have  
18 either assumed or adopted some sort of equitable  
19 tolling.

20           I think they are waiting for this Court,  
21 which has left the question open to provide guidance in  
22 that issue, and we suggest that either there be no  
23 equitable tolling or that, if there is to be equitable  
24 tolling, on the circumstances of this case it has to be  
25 extreme attorney misconduct or incompetence, and that

1 just simply is not established on this record.

2 CHIEF JUSTICE ROBERTS: What -- why isn't it  
3 extreme attorney incompetence to miss a deadline? I  
4 mean, you either miss it or you don't. It's not going  
5 to get -- why doesn't that qualify as extreme attorney  
6 misconduct?

7 MR. MAKAR: Well, I guess the short answer,  
8 of course, is the courts have said no, that's not  
9 enough, we need something that is truly extreme,  
10 something far from just missing a deadline. We probably  
11 all know lawyers who have missed deadlines. We all know  
12 lawyers who didn't communicate with their clients.  
13 Those things are ordinary, run of the mill, happen every  
14 day sort of events. It has to be something beyond that.  
15 I mean, it has to be something that is truly extreme for  
16 the exception to kick in.

17 CHIEF JUSTICE ROBERTS: Give me an example  
18 --

19 MR. MAKAR: Well --

20 CHIEF JUSTICE ROBERTS: -- that's worse than  
21 missing the deadline?

22 MR. MAKAR: The example I've tossed about in  
23 our conversations is to say, well, what if the post-  
24 conviction lawyer is bribed by the victim's family to  
25 not file something on time? I mean, oh gosh, that

1 strikes us all as --

2 CHIEF JUSTICE ROBERTS: Well, that's not  
3 negligence.

4 MR. MAKAR: No, no. But the question I  
5 thought you were asking is how extreme can we think  
6 about a situation, and so --

7 CHIEF JUSTICE ROBERTS: So it has to be  
8 criminal behavior?

9 MR. MAKAR: It has to be something beyond  
10 just attorney incompetence. What the -- that's a  
11 concept that we can get our arms around, and we  
12 certainly get into this line-drawing of, well, is a  
13 failure to communicate three or four times enough, or a  
14 failure to have a letter go to the client in response to  
15 his request, is that enough?

16 JUSTICE STEVENS: May I ask another  
17 question. It doesn't go to the merits, but I'm really  
18 curious. The lawyers selected for post-conviction work,  
19 which I understand now are compensated by the State, are  
20 they selected from the same panels as the lawyers that  
21 represent defendants generally and who are appointed by  
22 the State in criminal matters?

23 MR. MAKAR: There is a collateral counsel  
24 registry list. There is actually what they call CCRC.  
25 There's actually State lawyers around the State who

1 provide this, and then there is a registry list as well.  
2 And they have to meet certain standards. Chapter 27 of  
3 our Florida Statutes set out the standards that these  
4 counsel have to be ---

5 JUSTICE STEVENS: But the collateral counsel  
6 registry is a different group of lawyers than are  
7 generally appointed in criminal cases?

8 MR. MAKAR: Yes.

9 JUSTICE STEVENS: I see.

10 MR. MAKAR: Well, Your Honors, if there is  
11 no further questions, we ask that the court affirm the  
12 Eleventh Circuit below, either on the basis that there  
13 is no equitable tolling or that on this record there is  
14 no basis for it under the attorney incompetence  
15 standard.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Scher, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF TODD G. SCHER.

20 ON BEHALF OF PETITIONER

21 MR. SCHER: I just have a couple of brief  
22 points. First, to clarify, the Respondent argued that  
23 Mr. Holland never asked to proceed pro se in the State  
24 court, and that is just incorrect and it's flatly  
25 contradicted by their brief on page 43, where they

1 write: "Holland moved to replace Collins with another  
2 attorney, whom Holland presumably thought would raise  
3 any issues Holland desired, or to proceed pro se if  
4 substitute counsel could not be appointed."

5 And I think, again going back to one of the  
6 thing that Justice Breyer was discussing with  
7 Respondent's counsel, is I think that that -- the  
8 problem with the Eleventh circuit's analysis is this  
9 categorical exclusion. Equitable tolling and  
10 extraordinary circumstances have to be considered as  
11 a -- consider all the circumstances, and so to  
12 categorically exclude this one particular area we submit  
13 is what the problem is here. And we also do have,  
14 contrary to what the Respondent contended --

15 JUSTICE GINSBURG: But you would say you  
16 could categorically excuse ordinary negligence as  
17 opposed to gross negligence?

18 MR. SCHER: That's where courts, including  
19 this Court, have drawn the line. That seems to be the  
20 floor, but obviously when you get into the particular  
21 circumstances of the case that's where the categorical  
22 rule excluding a particular type of area beyond just  
23 garden-variety neglect -- really, that's the problem  
24 here, that that was antithetical to the notion of  
25 equity.



1                   And I wanted to point out briefly that this  
2   record does avail itself of numerous instances where Mr.  
3   Holland had alleged that the attorney lied to him. JA  
4   in the Joint Appendix on 170, Mr. Holland writes that  
5   Mr. Collins lied to him; On the Joint Appendix on 194,  
6   that Mr. Collins deceived him and misled him about when  
7   the petition was going to be --

8                   JUSTICE ALITO: What were the lies? Give me  
9   an example of a lie that he told him?

10                  MR. SCHER: These were in the context of Mr.  
11   Collins telling Mr. Holland that he would protect his  
12   federal habeas rights.

13                  JUSTICE ALITO: Doesn't that go without  
14   saying, that every attorney -- every attorney presumably  
15   undertakes not to miss the statute of limitations. Is  
16   there a difference between the attorney who simply says  
17   nothing and an attorney who says, yes, I'm not going to  
18   miss the statute of limitations?

19                  MR. SCHER: I think it makes it more --

20                  JUSTICE ALITO: Is that a lie?

21                  MR. SCHER: I think it makes it --

22                  MR. SCHER: I think it -- I think it makes  
23   it more extraordinary. And what makes that situation  
24   even yet more extraordinary is where the client has  
25   tried to rid himself of this lawyer on a number of

1 occasions or to go pro se, precisely because he has been  
2 experiencing these -- this lack of trust and other  
3 problems in terms of these deceptions from his lawyer,  
4 so he was really hamstrung by the time that --

5 CHIEF JUSTICE ROBERTS: If I am worried --  
6 if I am worried about the open-ended nature of what you  
7 were asking for, how -- how would you stated test you  
8 would like in the most restrictive terms?

9 MR. SCHER: I think in terms -- I think the  
10 test would be appropriate, what Justice Breyer  
11 articulated, which is --

12 CHIEF JUSTICE ROBERTS: Hurricane or  
13 kidnapping?

14 MR. SCHER: No, no.

15 CHIEF JUSTICE ROBERTS: Oh, the different  
16 one.

17 (Laughter.)

18 MR. SCHER: No, the other test, the other  
19 test. We need a hurricane exception in Florida.

20 But in terms of the Eleventh Circuit was  
21 incorrect in excluding this particular type of attorney  
22 misconduct and negligence because that is antithetical  
23 to equity, and so I think --

24 CHIEF JUSTICE ROBERTS: What type -- the  
25 problem comes up when you say this type of attorney

1 negligence.

2 What is your test? What type of --

3 MR. SCHER: I certainly think, given the  
4 unique facts here, we have, again, the confluence of  
5 circumstances, we have --

6 CHIEF JUSTICE ROBERTS: I know -- your  
7 client wins. Can you articulate --

8 MR. SCHER: Right.

9 CHIEF JUSTICE ROBERTS: Because I am very  
10 concerned that if you say, well, you can forgive an  
11 inequitable case, every time a case comes up, there  
12 is -- there is going to be sympathy for the client. The  
13 lawyer goofed.

14 Of course, you don't want to penalize the  
15 client, but Congress obviously had something more in  
16 mind.

17 MR. SCHER: Well, certainly, but the other  
18 part of the test for equitable tolling is diligence, and  
19 I think, when -- when one looks at the body of case law  
20 that has developed since 1997 on the issue of equitable  
21 tolling in AEDPA, the vast majority of these cases are  
22 disposed in the fact that the Petitioner isn't diligent.

23 Here, of course, the Respondent, if I heard  
24 correctly, is now conceding that the Petitioner was  
25 diligent, so there are certainly other ways to avoid

1 even having to get to the question of exceptional  
2 circumstances, for example, just looking to the  
3 diligence prong.

4 But here, where you have a failure to  
5 notify, you have a failure to heed the instructions from  
6 the client, you have the client saying, you have lied to  
7 me, the client telling the State and the Federal courts,  
8 this lawyer is not my agent anymore, I don't want him, I  
9 don't trust him, he has misled me, he has deceived me,  
10 all of those factors certainly go to a consideration of  
11 whether equitable tolling should be warranted, and the  
12 problem here is that the Eleventh Circuit said, no,  
13 categorically, no.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. SCHER: Thank you.

16 CHIEF JUSTICE ROBERTS: The case is  
17 submitted.

18 (Whereupon, at 11:54 a.m., the case in the  
19 above-entitled matter was submitted.)  
20  
21  
22  
23  
24  
25

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